UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FREDERICK J. MELLO,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 99-0118-B
	)	
CALAIS REGIONAL HOSPITAL,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is an action arising under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ["ADEA"]. Defendant employed Plaintiff as a security officer from 1987 until his discharge on May 18, 1996, his 53rd birthday. Plaintiff alleges that Defendant terminated his employment because of his age. Plaintiff's ADEA claim is the only one arising under Federal Law. Plaintiff's remaining claims arise under state law. Defendant moves for summary judgment on the entirety of Plaintiff's Complaint.

Discussion

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). "A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either

side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1st Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995)).

Age Discrimination in Employment Act

A plaintiff in an age discrimination case must set forth sufficient evidence on summary judgment from which a jury could conclude "'that he would not have been fired but for his age.'" *Mesnick v. General Elec.*, 950 F.2d 816, 823 (1st Cir. 1991) (quoting *Freeman v. Package Mach.*, 865 F.2d 1331, 1335 (1st Cir. 1988) (other citation omitted)). Where no direct evidence exists, plaintiff must proceed under the burden-shifting standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S.792, 802-05 (1973). *Id*. (citations omitted).

In this case, Defendant asserts that the *McDonnell Douglas* framework applies. It concedes for purposes of this Motion for Summary Judgment that Plaintiff would prevail on the first prong of that standard, and concentrates its argument on the second two: namely, whether Defendant has "articulat[ed] a legitimate, non-discriminatory reason" for the termination, and whether Plaintiff has adduced sufficient evidence that the stated reason was a pretext for age discrimination. *Id*. (citations omitted).

Plaintiff argues that he has direct evidence of discrimination, making the *McDonnell Douglas* framework irrelevant. This is a dispute the Court need not resolve. It is apparent from the evidence presented on this Motion for Summary Judgment that Defendant has articulated a legitimate non-discriminatory reason for Plaintiff's termination. Under *McDonnell Douglas*, the only question remaining is the same one posed in a direct evidence case: "whether, on all the evidence of record, a rational factfinder could conclude that age was a determining factor in the

employer's decision." *Id*. at 825 (citing *United States Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711, 716 (1983)). It is also apparent that Plaintiff's evidence of age discrimination includes statements made to him by his supervisor, Cody Stow, as well as evidence attacking the credibility of Defendant's stated reason for his termination. All of this evidence is relevant to the question whether Plaintiff can prove that he was fired because of his age. The issue on this Motion for Summary Judgment is whether he has sufficient evidence to reach a jury on that question.

Statement of Facts

In this District, statements of fact offered by the moving party are deemed admitted unless they are controverted in the opposing statement of fact. D. Me. R. 56(b),(e). Local Rule 56(c) describes in detail the duty of a party opposing summary judgment with respect to the Statements of Facts. Specifically, a non-moving party is required in his Statement of Facts to "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts." D. Me. R. 56(c). The rule does not require that a non-moving party submit factual statements in addition to those addressing the movant's Statement of Facts, but if the party elects to do so, those facts must be set forth in a separate section. *Id*.

Plaintiff's Statement of Disputed and Undisputed Material Facts does not comply with this Rule. Neverthless, because Plaintiff has clearly indicated in the first phrase of the relevant paragraphs his intent to controvert part or all of certain paragraphs of Defendant's Statement of Undisputed Facts, the Court will consider the Statement as filed. Plaintiff is hereby on notice that future summary judgment submissions must comply with the Court's local rules.

As an initial matter, what Plaintiff has presented as a contradiction in the evidence often falls short of the mark. In some cases, Plaintiff has actually offered *additional* information. The Court understands Plaintiff's argument that this additional information might support an inference other than the one Defendant suggests. Nevertheless, as a factual matter, the information does not directly contradict Defendant's factual assertion. Further, Plaintiff has presented facts tending to show that his supervisor had incorrect information about the events leading to Plaintiff's dismissal. These facts are irrelevant to the issue of the supervisor's knowledge.

Plaintiff's evidence to the contrary will be discussed as necessary. Defendant's Statement of Undisputed Facts, to the extent supported by the record, relevant to Plaintiff's claim of age discrimination, and not controverted, reads as follows:

> 1. The Plaintiff was hired by the Defendant to work as a security officer in 1987.
> 2. The Plaintiff's employment with the Defendant was terminated on May 18, 1996.
>
> . . .
>
> 5. The Defendant's security officers report directly to the Director of Plant Maintenance and Safety, Cody Stow.
>
> . . .
>
> 9. The Defendant's facility is equipped with a fire alarm system. The system has a panel located in the basement level of the facility and another panel on the first floor near the entrance that identify the location of a fire within the building during an alarm. In order to determine the location of a fire using the panel in the basement, it is necessary to view a code that is written on a sheet of paper kept near the panel. Using the code, a trained person can read a number on the panel and find the activated smoke detector within the facility that corresponds with that number. No code is necessary to identify the location of a fire using the panel of the first floor. The system also has magnetic devices that hold the interior doors open. If the alarm sounds the magnets release and the doors close.
> 10. The fire alarm in the hospital was a very expensive and reliable system. Prior to the alarm on May 16th, the Defendant was not aware of the fire

alarm ever sounding without there being an explanation for the alarm. The Defendant was never aware of the alarm sounding due to a power surge.

. . .

14. On May 17, 1996, Mr. Stow came to work at about 6:30 a.m. and he was notified by the night security person that a fire alarm had sounded the previous evening. Mr. Stow read the security log book for May 16th and he noticed that the Plaintiff had been on duty during the alarm and that the Plaintiff had reset the alarm twice. The notation in the log by the Plaintiff was that there had been a power overload that set off the alarm.

15. At approximately 7:00 a.m., a maintenance employee, Terry Brownlee, contacted Mr. Stow by radio and told Mr. Stow that it appeared that the hospital had had a fire the previous evening in the mechanical room, which is located in the basement of the facility. Mr. Stow went to the mechanical room and found that an electrical motor that was mounted halfway up the wall opposite from the entrance was completely burned and that black smoke stains ran up the entire length of the wall above the motor. The stains covered an area that was approximately three feet wide around the motor. There was also burned residue on the floor beneath the motor. The motor and the blackened wall were directly visible from the entrance to the mechanical room. From looking at the burned motor, Mr. Stow concluded that the motor had burned during the fire alarm and the Plaintiff could not have inspected the mechanical room the previous day because he surely would have noticed the motor if he had done so.

16. Mr. Stow thereafter spoke with various people to determine what had occurred the previous day, why the fire had not been detected sooner, and why Mr. Stow had not been notified of the alarm when it sounded.

17. Mr. Stow was told by the Manager of Nursing Services, Karen Sprague, that she had spoken with the Plaintiff during the fire alarm, and that she had asked the Plaintiff three times to contact Mr. Stow, and that on the last occasion the Plaintiff told Ms. Sprague that it was unnecessary to do so because Bob Mealy was there and knew all about it.

. . .

19. Of more concern to Mr. Stow was that the Director of Materials Management, Forest Woodruff, Jr., told Mr. Stow that Mr. Woodruff had complained to the Plaintiff of an "ozone/electrical smell" in the area of his office shortly after the alarm sounded. Mr. Woodruff told Mr. Stow that Mr. Mello walked past Mr. Woodruff without acknowledging the comment. Mr. Woodruff's office was located near the mechanical room.

20. Mr. Stow also spoke with the Defendant's Clinical Engineer, Christopher Parr. Mr. Parr told Mr. Stow that he was passing the downstairs alarm panel just as the alarm began to sound. Parr told Stow that he saw the Plaintiff open the alarm panel and reset the alarm without determining the location of the alarm. Mr. Parr told Mr. Stow that Parr paged the Plaintiff

shortly thereafter, and the plaintiff answered his page by stating that he was going to reset the panel again because the magnets were not sticking and the doors would not stay open. Parr told Stow that Parr thought that the Plaintiff was very lax in the way that he handled the situation.

21. Mr. Stow called the Plaintiff after speaking with his coworkers and he asked that the Plaintiff come to the hospital and explain his version of what had happened the previous day. [Plaintiff explained that he would be into work the following morning and that he would prefer to speak with him at that time as Plaintiff's house is 40 miles (one way) from the hospital.] Mr. Stow and the Plaintiff had a conversation over the phone about what had occurred, and the Plaintiff gave his explanation of what occurred. Mr. Stow asked why the Plaintiff had reset the fire alarm, and the Plaintiff responded that he did so because he knew that it was a false alarm.

. . .

23. Cody Stow thought that the fire and safety procedures at the hospital were very important to be followed.

24. At the time of the Plaintiff's termination, Mr. Stow knew that he had told all of the security officers (including the Plaintiff [who denies being told]) prior to May 16, 1996, that they were not to reset the alarm panel during a fire alarm. Rather, only Mr. Stow or his designee were to reset the alarm. Mr. Stow's designee was Richard Simpson. Further, Mr. Stow knew that the security officers had also been instructed to use the alarm panels to determine the location of an activated smoke detector if the alarm sounded so that they could go to that location and investigate. This was written in the hospital's "Fire Plan," a copy of which all security officers were required to read. Mr. Stow also knew that all security officers knew to inspect the mechanical room in the event of a fire alarm.

25. Based on Mr. Stow's investigation, he decided that the Plaintiff's employment with the Defendant should be terminated. Mr. Stow reached this conclusion because he believed that the Plaintiff's actions demonstrated that he was not responsible enough to hold the position of security officer, and Mr. Stow no longer had confidence in the Plaintiff's ability to insure the safety of the hospital.

26. Pursuant to the Defendant's written personnel policy, "neglect of duty or carelessness in performance of assigned tasks," is grounds for immediate dismissal.

27. On May 17, 1996, Mr. Stow spoke with Mr. Davis and relayed the information he had gathered. Mr. Stow explained to him that he had found an electrical motor that had burned in the mechanical room under Hall Wing in the hospital. This room is located under the "intensive care" or "special care" unit. Mr. Stow told Mr. Davis that Chris Parr had informed Mr. Stow that Mr. Parr had witnessed Mr. Mello reset the fire alarm. Mr.

Stow also said that Mr. Mello did not find the burned motor after the alarm sounded, and that Mr. Mello had apparently not conducted a thorough inspection to identify the cause of the alarm. Mr. Stow also told Mr. Davis that Forrest Woodruff had informed Mr. Mello that Mr. Woodruff smelled an ozone smell near his office.

28. Mr. Davis knew that the two fire panels show the location of a fire if the alarm is sounding. Mr. Davis viewed the breach of duty by Mr. Mello to be extremely serious, and felt that Mr. Mello acted carelessly and that he had placed the occupants of the hospital in danger. Based on the information that was shared with him, Mr. Davis asked for Mr. Stow's opinion about the appropriate measure of discipline for Mr. Mello. Mr. Stow recommended that Mr. Mello be terminated, and Mr. Davis agreed with his recommendation. Based on these facts, had Mr. Stow suggested a lesser punishment, Mr. Davis would have overridden his recommendation and terminated Mr. Mello's employment.

29. Mr. Stow met with the Plaintiff on May 18, 1996 and told the Plaintiff that his employment with the Defendant would be terminated.

Def. Stmt. of Facts (Docket No. 5) (citations omitted).

Much of Plaintiff's evidence of age discrimination goes to the credibility of the reports made by the employees to Mr. Stow. For example, Plaintiff asserts that he left a message at Mr. Stow's home about the alarm and that he relayed this fact to Ms. Sprague. Pltf. Stmt. of Facts, ¶ 17 Docket No. 12). If this is so, and Mr. Stow concedes that it is although he was not told about the message until much later, Ms. Sprague's report to Mr. Stow that Plaintiff had essentially refused to contact Mr. Stow was incorrect. This type of evidence does not, however, controvert Defendant's evidence about Mr. Stow's knowledge. In addition to Mr. Stow's affidavit describing what he was told, Defendant has offered Ms. Sprague's affidavit stating that "I told Cody Stow . . . that I had asked [Plaintiff] three times to contact Mr. Stow, and that on the last occasion the Plaintiff told me it was unnecessary to do so . . . ." Sprague Aff., Ex. D to Def. Stmt. of Facts.

Similarly, Plaintiff asserts that Forest Woodruff never complained to him about an "ozone/electrical smell." Pltf. Stmt. of Facts, ¶ 47. This assertion is actually consistent with Mr. Woodruff's statement that Plaintiff walked by him without acknowledging the complaint; perhaps Plaintiff did not hear him. Plaintiff also offers evidence supporting his inference that Mr. Woodruff's version of events is not credible. Again, however, Mr. Stow's and Mr. Woodruff's affidavits clearly indicate that Mr. Woodruff told Mr. Stow that he complained and Plaintiff ignored him. Importantly, Plaintiff has not alleged that either Ms. Sprague or Mr. Woodruff harbored any discriminatory intent that caused them to give Mr. Stow incorrect information.

There is also some evidence in the record of work-related incidents for which Mr. Stow issued a written warning to Plaintiff a month prior to the alarm incident giving rise to his termination. Pltf. Stmt. of Facts, ¶ 8. Plaintiff argues that his performance reviews were satisfactory, and the warning is nothing more than additional evidence that Mr. Stow harbored animosity toward Plaintiff. Pltf. Stmt. of Facts, ¶¶ 6-7, 11; Pltf. Memo. at 4-5. There is no need to resolve any factual dispute regarding Plaintiff's work history, however. First, there is simply no evidence that this animosity, if it existed, was related in any way to Plaintiff's age. Furthermore, there is no evidence these incidents played any role in Defendant's decision to terminate Plaintiff's employment.

Plaintiff has also offered credible evidence that he was not present for the March, 1996 meeting at which his coworkers were told they were not to reset the alarm, and that he was never otherwise told of the new policy. Pltf. Stmt. of Facts, ¶¶ 37-40. However, even assuming the worst, that Mr. Stow purposely ignored the fact that Plaintiff had not learned of the policy, this

evidence is of little help to Plaintiff in light of the other information Mr. Stow relied upon in recommending Plaintiff's dismissal. The fact that Plaintiff reset the alarm in violation of a policy prohibiting him from doing so was only one of Mr. Stow's stated reasons for believing Plaintiff should be terminated. Further, Defendant has presented the Chief Executive Officer of the hospital's affidavit in which he describes the information he relied upon and his thinking process relative to plaintiff's termination as follows:

> 3. On May 16, 1996, I was present during a fire alarm at the hospital. Mr. Mello was on duty as a security officer at that time. Prior to alarm [sic] on May 16th, I am not aware of the fire alarm ever sounding without our being able to find an explanation for the alarm. I was never aware of the alarm sounding due to a power surge.
> 4. On May 17, 1996, I was approached by Cody Stow to discuss one of our security officers, Fred Mello, and the events of the previous day. Mr. Stow explained to me that he had found an electrical motor that had burned in the mechanical room under Hall Wing in the hospital. This room is located under the "intensive care" or "special care" unit. Mr. Stow told me that Chris Parr had informed Mr. Stow that Mr. Parr witnessed Mr. Mello reset the fire alarm. Mr. Stow also told me that Mr. Mello did not find the burned motor after the alarm sounded, and that Mr. Mello had apparently not conducted a thorough inspection to identify the cause of the alarm. Mr. Stow also told me that Forrest [sic] Woodruff had informed Mr. Mello that Mr. Woodruff smelled an ozone smell near his office. Mr. Woodruff's office is located near the mechanical room.
> 5. I knew that the two fire panels show the location of a fire if the alarm is sounding.
> 6. I viewed the breach of duty by Mr. Mello to be extremely serious. I felt that Mr. Mello acted carelessly and that he had placed the occupants of the hospital in danger. Based upon the information that was shared with me, I asked for Mr. Stow's opinion about the appropriate measure of discipline for Mr. Mello. Mr. Stow recommended that Mr. Mello be terminated, and I agreed with his recommendation. Based on these facts, had Mr. Stow suggested a lesser punishment, I would have overridden his recommendation and terminated Mr. Mello's employment.

Davis Aff., Ex. C to Def. Stmt. of Facts. Plaintiff's alleged violation of the policy prohibiting him from resetting the alarm is only one small factor in the Defendant's decision-making

process. Further, it is not even clear that Mr. Davis understood there was such a policy. His concern appeared to relate more to the fact that Plaintiff had reset the alarm without first locating the source.

In addition, Plaintiff points to Mr. Stow's concession that the fire at the electrical box could have occurred either before or after Plaintiff's shift on May 16. Pltf. Stmt. of Fact, ¶¶ 31-32. If, however, the fire occurred prior to Plaintiff's shift, Plaintiff is still faced with Mr. Stow's belief that Plaintiff would have seen evidence of it during his usual rounds. Further, the concession does not render Mr. Stow's conclusion that it did occur during Plaintiff's shift unreasonable, particularly in light of the fact that it is uncontroverted that Mr. Stow was informed that the fire alarm had sounded during Plaintiff's shift.

For the same reason, the Court does not find it particularly relevant that the officer on duty after Plaintiff, who also failed to find the fire residue at the electrical box, was not also fired. Pltf. Stmt. of Facts, ¶ 36. Defendant does not assert Plaintiff was fired only because he was sloppy about his rounds, but rather because he mishandled in several respects the fire alarms that sounded during his shift.

Finally, Plaintiff asserts that he received information from a local fire official indicating the alarm might have been caused by a transformer problem located near the hospital's emergency room entrance, or a grass fire that had occurred across the street. He notes that the hospital's CEO, Mr. Davis, indicated he was informed likewise. Pltf. Dep. pp. 48-51. The Court understands that this information might have confused the proceedings surrounding the alarm. Plaintiff is still faced, however, with uncontroverted evidence that Mr. Stow learned of

the alarm and found evidence of a fire and concluded that Plaintiff had not properly investigated the cause of the alarm.

This is not a case where the employer's testimony about the reasons for the dismissal was contradictory or confused. *Cf., Castleman v. Acme Boot* Co., 959 F.2d 1417, 1422-23 (7th Cir. 1992), *cited in Dominguez-Cruz v. Suttle Caribe, Inc.*, No. 98-2296, 2000 WL 97676 *6 (1st Cir. Feb. 2, 2000). At best, Plaintiff has offered evidence tending to suggest his termination was handled rather carelessly, without regard to some of the mitigating circumstances surrounding the alarm incident. Most important, however, none of this evidence raises any inference of age discrimination. It is long settled that the "ADEA does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the decision to fire does not stem from the person's age." *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1341 (1st Cir. 1988).

The only evidence Plaintiff has offered that directly implicates his age includes two statements Mr. Stow made referencing age. Such evidence may support an inference of age discrimination, however the weight to be given age-related remarks is lessened where the remarks were "'temporally remote from the date of the employment decision or . . . were not related to the employment decision in question or were made by nondecisionmakers.'" *Dominguez-Cruz*, 2000 WL 97676 *8, n.6 (quoting *McMillan v. Massachusetts Soc'y for the Prev. Of Cruelty to Animals*, 140 F.3d 288, 301 (1st Cir. 1998)).

The first remark about which Plaintiff complains occurred in January, 1996, when Plaintiff was stripping and polishing the floor at the end of a 10-hour shift. Mr. Stow passed him in the hall and commented that Plaintiff was getting to be too old for that kind of work. Pltf.

Stmt. of Fact, ¶ 9. Plaintiff concedes that he took no offense at this comment at the time it was made. Pltf. Dep. Tnscpt. at pp. 32-33. The second occurred on a Monday morning in January or February of 1996 after Plaintiff had spoken to Mr. Stow about employee complaints that had been made to him over the weekend. As Plaintiff left the room he overheard Mr. Stow say that he "wanted to get rid of that old bastard." Pltf. Stmt. of Fact, ¶ 10. Plaintiff believed Mr. Stow was referring to him, but has no evidence to support that belief. For all this record shows, Mr. Stow might have been referring to one of the employee complainants. These comments, although made by the person responsible for seeking Plaintiff's termination within a five month period prior to Plaintiff's termination, are simply not connected in any way by the evidence to the decisionmaking process.

Plaintiff's evidence is quite different from evidence the First Circuit Court of Appeals recently found probative of discriminatory intent. In *Dominguez-Cruz*, the key decisionmaker repeatedly made age related references to plaintiff. *Dominguez-Cruz*, 2000 WL 97676 *7. In addition, a younger employee was heard reporting that he had been offered "the old man['s]" job, referring to plaintiff. Most condemnatory were notes made by the personnel manager regarding the decision to terminate plaintiff's employment that included the phrases "'cover up so [plaintiff] doesn't,' 'all over 40,' . . . and 'age discrim. [sic].'" *Id*. The Court of Appeals found these comments worked together with other evidence to support an inference of age discrimination, noting in particular the peculiar choice of the words "cover up." *Id*. This Court affords relatively little weight to the comments at issue in this case.

Plaintiff also points to the fact that his replacement was 21 years old, and that all of the other security personnel, including Mr. Stow, were younger than Plaintiff. Pltf. Stmt. of Fact, ¶¶

42-43. This evidence, even when viewed in combination with Plaintiff's evidence questioning Mr. Stow's conclusions about the fire, simply does not amount to a sufficient showing that Plaintiff was fired because of his age. As noted previously, Plaintiff's evidence suggests that the matter of his termination might have been treated somewhat carelessly by Mr. Stow, but this is not enough to support an inference of age discrimination. *See, Freeman*, 865 F.2d at 1341 ("the most attenuated link in the chain . . . was whether plaintiff had proven that age – as opposed, say to . . . animosity, . . . or a garden variety mistake in corporate judgment . . . – was responsible for the ouster"). Defendant is entitled to summary judgment on Plaintiff's claim under the ADEA.

State Law Claims

In light of the Court's conclusion with respect to Plaintiff's only federal claim, the Court is within its discretion to dismiss the pendent state law claims. 28 U.S.C. § 1367(c)(3); *Mercado-Garcia v. Ponce Federal Bank*, 979 F.2d 890, 896 (1st Cir. 1992); *Miller v. Kennebec County*, 63 F. Supp.2d 75, 85 (D. Me. 1999). I recommend the Court decline to exercise further jurisdiction over these claims.

Conclusion

For the foregoing reasons, I hereby recommend the Court GRANT Defendant's Motion for Summary Judgment on Plaintiff's claim under the ADEA, and DISMISS the pendent state law claims.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
United States Magistrate Judge

Dated on: March 8, 2000

TRLIST STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-118

MELLO v. CALAIS REGIONAL HOSP Filed: 04/30/99
Assigned to: JUDGE MORTON A. BRODY Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 442
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 29:621 Job Discrimination (Age)

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